NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

February 9, 2005

Via Federal Express and electronic mail

California Energy Commission
Dockets Office
Attn: Dockets 04-SIT-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

Re: Comments on Siting Committee Workshop on Petroleum Infrastructure Best Permitting Practices

Dear California Energy Commission:

On behalf of the Natural Resources Defense Council ("NRDC") and our 600,000 members, over 110,000 of whom reside in California, we submit these comments on the California Energy Commission's Siting Committee Workshop on Petroleum Infrastructure Best Permitting Practices. *See* "Notice of Siting Committee Workshop on Petroleum Infrastructure Best Permitting Practices," Docket 04-SIT-1.

1. Differences Between Power Plants and Petroleum-Related Activities Make Permit Streamlining Imprudent

At the outset, it is fundamental to understanding the imprudence of permit streamlining the refinery process that we outline the differences between power plant approval, operation and expansion vis-à-vis refinery approval, operation and expansion. Relative to refineries, assessing the environmental and public health impacts of power plant approval, operation and expansion is simple and uncomplicated. The operational units and turbines interact as a whole to generate electricity, serving as a fairly hermitic unit with easily quantifiable emissions. The environmental and public health effects of an expansion or modification are therefore straightforward.

Refineries, conversely, are very complex. The facility itself is a series of continuous and connected sub-processes and operations that, depending on the activity, can adversely effect the operation and output (in terms of emissions and quality of product) of activities further downstream. For this reason, every modification of equipment or change in input must undergo an analysis for its effects on the entire system and be subject to review of the technical alternatives and mitigation measures. The engineers that evaluate these processes and proposed modifications take many years to train and they work in close tandem with on-the-ground inspectors. To understand and assess each alteration is a highly technical affair.

Moreover, such review by the air quality management districts (AQMD) is mandatory. Under the Clean Air Act (CAA) and as part of the federally-enforceable state implementation plan (SIP), AQMD must assess the SIP implications regardless of California Energy Commission (CEC) involvement. 42 U.S.C.A. § 7401 *et seq*. Title V of CAA is applicable to refineries and under the jurisdiction of AQMD. 42 U.S.C.A. § 7661-(f). CEC involvement would simply add another layer without any identifiable utility.

2. Best Permitting Practices Must Include Local Public Participation in Decisionmaking

Public participation is a fundamental tenet of environmental justice and participatory democracy. The ability of affected communities to meaningfully participate and influence the outcomes of governmental decisions must be strengthened and cultivated –especially for members of disenfranchised, disparately-impacted communities without the means or connections to otherwise influence these decisions. Yet, despite meaningful public participation's primacy in fostering responsive, inclusive and reasoned decisionmaking, it is too often misunderstood and, accordingly, formalized into meaningless procedures devoid of content and authority: form over function rather than form *and* function. In workshops conducted by the CEC to investigate the state's petroleum infrastructure held during the course of 2004, and early indications in this latest round of workshops, the CEC fails to grasp the scope of what localized and meaningful public participation entails.

The best permitting practices must include meaningful public participation opportunities for the local communities adversely affected by the state's petroleum refining, importing, storage and pipeline systems (hereinafter "petroleum-related activities"). The implications following from this statement are fourfold. First, local committees and community-based groups adjacent to petroleum-related activities must be afforded adequate notice of, access to, and meaningful commenting opportunities at workshops, meetings and hearings for placement of new or expansion of old petroleum facilities.

Notice must be provided within an adequate period of time in the venues and periodicals that will provide the highest degree of notice and publication to the community at large. Sometimes, however, traditional forms of notification are not enough. Local officials are in the best position to comprehend this as South Coast Air Quality Management District Rule 212 (hereinafter "Rule 212") demonstrates. *See* AQMD Rule 212. For example, under Rule 212, certain new or modified permit unit sources under Regulation XX and XXX are subject to special notification requirements. If the facility or modification is within a ¼ mile of a school, distribution of public notice shall be provided to the parents or legal guardians of children attending that school. *See* AQMD Rule 212(c)(1) and (d). Additionally, notice must be sent out to properties within 1,000 feet from the outer property line of the proposed new or modified facility. *Id.* In short, Rule 212 creates notification requirements tailored specifically to foster essential public participation. Services such as these have developed over time through collaboration between local residents and local agencies.

Closely related to providing adequate notice, public participation relies on providing both physical and timely access to the permitting process. Therefore, removing decisionmaking

authority from local land use agencies and devolving AQMD of permitting responsibilities for petroleum-related activities stifles public participation by placing decisionmaking authority in far-off, appointed bureaucrats inaccessible to local constituencies due to time, geographical and financial constraints.

Second, control for permitting petroleum facilities should vest in the hands of local officials that are accountable to the affected constituencies. In this way the views of the affected community are better positioned to be fleshed out, heeded and acted upon. Because the negative effects of any given petroleum-related activity are principally felt by the surrounding communities, the ability of the local community to influence and control decision-makers through the local democratic and political process becomes of primary importance – lest far-off, appointed bureaucrats subject otherwise impotent communities to excessive environmental degradation and increased health risks based solely on personal views of what they consider to be permissible respiratory problems, cancer indices, toxic exposure and blight. For those reasons, decisions that affect the health and environment of local residents should be made locally where decision-makers are accountable to the people.

Third, public participation cannot be "streamlined" without compromising its benefit to and the integrity of the public participation process. Decisions affecting the environment and public health are subject to procedural and substantive mechanisms because of the far-ranging and intimate ramifications of each action. Efforts to remove control from local land use agencies, exempt petroleum-related activities from the requirements of the California Environmental Quality Act (CEQA), Pub. Resources Code § 21000 et seq., and limit administrative and judicial review opportunities each, in turn, would eliminate important public participation opportunities and threaten safeguards against arbitrary government action.

Fourth, local land use agencies and air quality management districts (hereinafter "local agencies") are better armed with greater familiarity of the area and impacts that would result from any given decision. Local familiarity provides local agencies with an understanding of the history, the community vision, and the context of a given action. This enhances their ability to respond to community input and, as a result, ensures a greater degree of incorporation of community views in the environmental assessments, proposed alternatives and mitigation measures.

3. Best Permitting Practices Must Address Cumulative Impacts to Environment and Public Health

The best permitting practices take into account the health and nuisance impacts of the cumulative emissions from sources that comply individually with AQMD, state and federal rules. In neighborhoods in or adjacent to a relatively large number of industrial facilities, the concern about accumulated effects of numerous emission sources operating within close proximity to residences and schools is heightened.

Local activists and community organizations in the South Coast Air Basin have worked hard to help define the scope of the cumulative impacts problem and local agencies' response thereto. *Compare* South Coast Air Quality Management District, White Paper on Potential

Control Strategies to Address Cumulative Impacts from Air Pollution, August 2003 (Enclosure 1), *with* California Energy Commission, Cumulative Impact Protocol, at http://www.energy.ca.gov/sitingcases/smud/documents/applicants_files/AFC_CD-ROM/02_AFC_Volume_2/ap_8_1g.pdf (last checked on Feb. 4, 2005). These responses go further than those analyses required under CEQA or developed by CEC because they take into account and are based on a familiarity with the reality on the ground – i.e., location and emissions of mobile and stationary emission sources, transportation corridors, air basin air quality, air inversion characteristics of the region, foreseeable future projects, local geography, etc. As would be expected, cumulative impacts are best provided by local residents and local agencies living and working in the specific region.

4. Best Permitting Practices Must Provide Adequate Opportunities for Administrative and Judicial Review

The best permitting practices for petroleum-related activities must not infringe upon the rights to administrative and judicial review currently afforded to interested individuals. On January 27, 2005, at the workshop held at Banning's Landing Community Center (hereinafter "Banning Workshop"), CEC maintained that adequate administrative and judicial review currently exists within CEC's permitting process for power plants. In our experience, this is untrue. Current administrative review for power plants entails one simple procedure within CEC, which provides the only mandatory review for project opponents.[1] If the administrative challenge for reconsideration fails, the project opponent's sole recourse is to petition the California Supreme Court to review, at its discretion, the administrative decision. Pub. Resources Code § 25531. In no instance is there mandatory judicial review of agency action.

In the Banning Workshop, CEC stated that the California Supreme Court's failure to undertake discretionary review of a single power plant permit decision demonstrates that the quality and integrity of its decisionmaking process is sound. This is fallacious reasoning.[2] A realistic understanding of the judicial process and case management is necessary. First, it is prohibitively expensive for many project opponents to present a case before the California Supreme Court. The lower courts are a more accessible forum and much more convenient in terms of proximity and costs.

Second, as a case works its way up the judiciary system issues are defined and opportunities for negotiated settlement present themselves. These benefits are twofold. On the one hand, the California Supreme Court benefits immeasurably from having as a basis for its review the reasoning and logic of mandatory review by lower courts. On the other hand,

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[1] Despite the fact that CEC's siting process for thermal power plants has been determined to be a certified regulatory program under CEQA and the functional equivalent for preparing environmental impact reports, its environmental assessment/report is not subject to mandatory judicial review.

[2] The fallacy known as *affirming the consequent* is defined as follows: (i) if A then B; (ii) B; (iii) therefore, A. In the current instance it takes the form of: (i) if the quality and integrity of the CEC's permitting process is sound then the California Supreme Court will not exercise discretionary jurisdiction; (ii) the California Supreme Court did not exercise discretionary jurisdiction; (iii) therefore, CEC's decisionmaking process is sound. The problem with this line of reasoning is that even if the premise is true, the conclusion could be false. B might be a consequence of something other than A, i.e., the California Supreme Court might fail to exercise discretionary jurisdiction for reasons other than the soundness of CEC's permitting process.

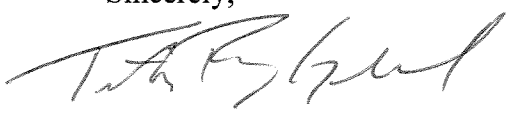
negotiated settlement results in win-win situations that benefit all parties, precluding California Supreme Court involvement. The California Supreme Court may find a case of first impression that has not enjoyed those benefits to be unattractive, thereby discouraging the exercise of jurisdiction.

Third, the California Supreme Court engages in case/docket management that, because of real time constraints, prohibits the California Supreme Court from hearing all cases that merit its deliberation. For all these reasons and more, claims as to the soundness of the power plant permitting process as evidenced by the lack of California Supreme Court review must be tempered with judicial realism. Given the reasons outlined above, it would be imprudent to eliminate current administrative and judicial review opportunities for petroleum-related activities – and impose power plant permitting processes on refinery activities – based on California Supreme Court's failure to exercise its discretionary jurisdiction in the power plant cases.

By way of contrast, the current permitting process for petroleum-related activities provides adequate administrative and judicial review opportunities to ensure reasoned decisionmaking. AQMD provide administrative review opportunities that, by virtue of being federally- and state-enforceable, are afforded mandatory judicial review. Moreover, the CEQA process itself provides mandatory judicial review for project opponents should its procedural and substantive provisions be violated. These protections guard against arbitrary and capricious agency action and honor a fundamental precept of our legal system by affording opportunities for judicial review of government action. The current system should be commended for its administrative and judicial review opportunities, not condemned.

We urge the CEC to abandon its permit streamlining ambitions for petroleum-related activities. The causes of petroleum infrastructure development constraints are not the processes created to ensure adequate deliberation on the environmental and public health effects, rather they result from the complicated and technical nature of refinery activities. Eliminating or streamlining current permitting practices will threaten the environment, stifle meaningful public participation and foster environmental injustice.

Sincerely,



Timothy Grabiel, Esq.

Enc.

cc: Barry Wallerstein, Executive Officer, South Coast Air Quality Management District
Alan C. Lloyd, Ph.D., Agency Secretary, California EPA